No evidence was called on behalf of the defendants.

PW2 stated that he would classify Pengerang as a poor estate and Santi as a medium estate in 1952 which is the beginning of the period with which we are concerned. It would therefore appear that a reasonable rate of commission would be 5% on the net earnings of Pengerang and Santi Estates, or 2½% on the net earnings of all the Group Estates. There was however a General Manager for the Group and his rate of commission should be deducted from this percentage. Evidence was given that the Manager during the whole of the period with which we are concerned was a Mr. Miles who was paid 1½% of the net profits of the Group. Therefore the figure of 5% will have to be reduced by 1½ to 3½%, and the figure of 2½% will have to be reduced by ¾ to 1¾%. The deceased was the only Manager of Pengerang and Santi Estates and therefore in my opinion it is reasonable that he should have been paid a commission of 3½% on the net earnings of Pengerang and Santi Estates, or 1¾% on the net earnings of the Group (on the basis that the net earnings of Pengerang and Santi Estates constitute more or less half the net earnings of all the Group Estates).

It was submitted for the defendants that a number of Managers had been employed by them at figures of from .2% to .6% commission and that therefore the commission which had been either paid or offered to the deceased's Estate was sufficient. I do not think the fact that these rates of commission had been acceptable to certain individuals in any way negatived the expert evidence of PW1, PW2 and PW3 as to the general rates of commission payable throughout the industry. The circumstances of an individual can be relevant in determining the amount of salary and commission which that individual is prepared to accept

The paragraph headed "Commission" in the said letter referred to the net profits of the Company (that is the Group) and set out what was meant by net profits. I hold therefore that reasonable commission to be paid by the defendants to the deceased for the periods in question can be ascertained by taking figures representing 1¾ per centum of the net profits of the Company during such periods.

Order accordingly.

Solicitors: *Rodyk & Davidson; Drew & Napier.*

TAN KOOI NEOH v. CHUAH TYE IMM

[A. C. J. (Rigby J.) November 20, 1957]
[Penang — Civil Appeal No. 5 of 1957]

Workmen's compensation — Death of member of crew of junk in wreck — Whether deceased was workman or co-adventurer — Coastal traders — Evidence of custom — Arbitration — Unsworn statements made in absence of parties — Admission.

Mercantile law — Evidence of custom — Coastal traders — "Kongsi" on a venture on a profit sharing basis.

In this case the respondent claimed workman's compensation on the death of her husband who was employed as a members of the crew of a junk which was wrecked. The principal question at issue was whether the deceased was a workman or whether he and the other members of the crew of the junk were partners with the taikong in a joint venture. The arbitrator held that the deceased was a workman but in so deciding relied on the unsworn statements of three members of the crew made to a labour officer.

Held: (1) the onus of proof of establishing that her husband was a workman and therefore entitled to compensation under the Workmen's Compensation Ordinance was upon the respondent:

(2) the fact that the arbitrator had acted upon and treated as evidence unsworn statements made in the absence of the parties and without an opportunity to cross-examine on such statements was a mistake of law and therefore the appeal must be allowed and a new inquiry ordered before another arbitrator.

WORKMEN'S COMPENSATION.

R. D. Hume for the appellant.

M. Abraham for the respondent.

Rigby J. : — This is an appeal from a decision of the learned President of the Sessions Court sitting as an Arbitrator under the Workmen's Compensation Ordinance, 1952.

No appeal lies from such a decision except on questions of law. The appeal comes before the High Court upon a certificate given by me under section 39(2) of the Ordinance that the decision of the Arbitrator involves a question of law which it is desirable in the public interest to have determined by the High Court.

The application for a certificate was made to me by way of Originating Motion. Of necessity it was supported by an affidavit and by copies of certain relevant documents. Neither the grounds of decision of the learned Arbitrator nor the notes of evidence taken by him were before me. The reason for this was that when the present appellant applied for a certified copy of the notes of evidence for the purpose of appealing against the decision she was informed by the Registrar of the Sessions Court, in writing, that since no right of appeal existed except on a point of law it was regretted that her request for a certified copy of the notes recorded during the course of the inquiry could not be granted.

On the face of the application itself and the supporting affidavit and enclosures I was certainly of

the opinion that a question of law of some practical importance was involved and that I ought to grant a certificate for the argument and determination of that point by the High Court. Having now had an opportunity to study the record and the grounds of decision of the Arbitrator I entertain considerable doubt as to whether I would have granted my certificate in the first instance if I had then had the Arbitrator's notes of evidence and grounds of decision before me, since it appears to me that although there was a point of law — and one of considerable practical importance — involved that point was sufficiently clearly before, and appreciated by, the Arbitrator and that the decision given by him really turned on matters of credibility and questions of facts. I think it would have been very much more satisfactory if the Registrar of the Sessions Court, in the first instance, had supplied the appellant with a copy of the Arbitrator's notes of evidence as originally requested by her. However, since there is, I repeat, a question of law of some practical interest and importance involved, I propose to deal with it perhaps rather more fully than did the learned Arbitrator.

The admitted facts of the case which gave rise to the claim for compensation under the Workmen's Compensation Ordinance are sufficiently set out in the grounds of decision of the Arbitrator as copied by him from the formal application to him under Regulation 38 of the Workmen's Compensation Regulations, 1953. They are as follows :—

"A sailing junk, No. 1218 registered in the Shipping Office, Penang, as owned by the Appellant, carried charcoal between Siam and Penang. On one of its journeys, while off the Siamese coast on the 20th November, 1955, the junk was wrecked and two members of the crew were drowned. The widows of both the deceased live in Penang and they reported the accident at the Labour Office, Penang, on the 5th December, 1955. The taikong or master of the junk was one Chan Boon Thong, the son-in-law of the Appellant. Chan Boon Thong was recorded in the Shipping Office, Penang as master of the junk. The crew of the junk consisted of 8 Chinese. The application to the Arbitrator was made by or on behalf of Chuah Tye Imm, the widow of one of the two deceased."

It was agreed between the parties that the two deceased were, in fact, members of the crew; that they were both drowned on the 20th November, 1955, when the junk was wrecked; that Chan Boon Thong was the taikong of the junk; that Chuah Tye Imm was, in fact, the widow of one of the two deceased; and that the circumstances and issues in both cases concerning both widows were the same.

The points in issue between the parties were :—

(1) Whether the deceased was, in fact, a "workman" within the meaning of the Workmen's Compensation Ordinance, 1952;

(2) Whether the Appellant, as owner of the junk, was in fact the employer of the deceased; and

(3) Whether the deceased and the rest of the crew received "earnings" within the meaning of the Ordinance for their work on the voyages.

The appellant's contention throughout was, and has been, that she was not the employer of the crew at the material time, since at that time she had leased the junk to the taikong on a profit sharing basis and she produced in evidence a written agreement, dated the 31st January, 1955, to that effect. One clause in that agreement stated :—

"Agreed that profits are to be divided thus:— 4 shares to the junk owner and 6 shares to taikong Chan Boon Thong."

Chan Boon Thong, the taikong, confirmed the appellant's statement that he had leased the junk from her on a profit sharing basis and that he had been doing so on that basis for the last four to five years. As to the crew of the vessel he denied that they received any salary as such, but contended that they were paid on the basis of a share of the profits resulting from the particular voyage, or voyages, on which they were employed.

On the other hand, the contention of the widow, the present respondent, was that the members of the crew were paid a definite salary as workmen on board the vessel. Section 22 of the Ordinance does, in fact, apply the Ordinance to seamen in the same way as to workmen, subject to certain modifications.

I think there can be no doubt that if, in fact, the members of the crew were co-adventurers with the taikong — whether the taikong was acting as a principal on his own behalf or as an agent acting on behalf of the owner of the vessel — in a joint venture on a profit sharing basis then, as a matter of law, they would not be "workmen" within the meaning of the Ordinance.

Our Workmen's Compensation Ordinance is based upon the English Act of 1925. Section 3 of that Act in its definition of "Workman" includes .—

"A person engaged in plying for hire with any vehicle or vessel the use of which was obtained by that person under any contract of bailment (other than a hire purchase agreement) in consideration of the payment of a fixed sum or a share in the earnings or otherwise."

Those words are entirely omitted from the definition of "workman" as contained in section 2 of our Workmen's Compensation Ordinance. No explanation is given in the Objects and Reasons attached to the Bill itself as to why these words have been omitted. But Mr. Hume submitted that they were deliberately excluded from our Ordinance in order to give recognition to the custom of the country — a custom common to both Chinese and Malay — of persons engaging together as a "kongsi" on a venture on a profit sharing basis. As general examples of such ventures Mr. Hume referred to the practice of rubber tappers, both Chinese and Malay, working together on a "bahagi dua" or share and share alike basis, and also to the Chinese custom of miners working together on a

profit sharing basis in the open cast system of tin mining. He submitted that not only was there general evidence in this case that such a custom prevailed among coastal traders, both Chinese and Malay, but there was specific evidence that the members of the crew in this case had been engaged on that basis. He contended, therefore, that this was a vessel engaged in plying for hire in matters of coastal trading or carriage of freight; that the vessel itself had been obtained by a contract of bailment between the owner and the taikong; and that the taikong and members of the crew were joint adventurers voluntarily associating together on the basis of shares in the trading venture. In my view Mr. Hume's contention as to the law is perfectly correct. To my mind the difficulty in this case was not one of law but solely of fact as to whether or not the evidence adduced on behalf of the appellant supported her contention.

As to evidence as to custom, Mr. Hume referred to two matters on the record. First, the general statement made by the then Labour Commissioner, Mr. Dunlop, in presenting the case before the Arbitrator on behalf of the widow, under section 32 of the Ordinance. Mr. Dunlop, according to the record, stated :—

"Before the War owners employed crews on a monthly salary. Later this did not leave owners with sufficient profits, as a quick journey was the aim of the owners. Change of incentive; piece rate profit sharing system."

Secondly, Mr. Hume referred to a letter, a copy of which is upon the record, written by the then Acting Director of Marine. The letter was in answer to a question specifically put to him by the Deputy Commissioner of Labour, Penang. It reads as follows :—

"You have asked me to advise you what is the customary method of payment of wages to the crews of native sailing ships plying out of Penang.

2. To the best of my knowledge, it is customary for these crews to be paid on the basis of a share of the profits resulting from the particular voyage on which they have been employed."

The letter adds as a postscript the following :—

"This is exactly the same system as for fishermen in the U.K. But the master is still the employer and his crew are his employees. Earnings must be calculated on the shares obtained on the various voyages by this or by other such craft."

If the intention of that postscript was to state that fisherman in the United Kingdom, though paid on the basis of a share of the profits, are still to be regarded as "workmen" for purposes of being entitled to compensation under the Workmen's Compensation Ordinance, then, as Mr. Hume pointed out, that statement is exactly the converse of the true position in law in England, since under section 35(2) of the English Act "members of the crew of a fishing vessel as are remunerated wholly or mainly by shares in the profits or the crew's earnings of the working of such vessel" are expressly excluded from the provisions of the Act, subject to such modifications as the Secretary of State may by order provide.

However, one of the many difficulties in this case, when dealing with the facts, is that neither the general statement made by Mr. Dunlop nor the letter written by the then Acting Director of Marine are, of course, evidence in the ordinary sense of the word, since neither of them were given under oath or affirmation nor were the persons who made them put forward for cross-examination.

As to the specific evidence to establish that the crew in this case were engaged by the taikong on a profit sharing basis, Mr. Hume relied upon :—

(a) The sworn statements made by the taikong and the Appellant;

(b) The extracts from the books of account belonging to and produced by the taikong and the Appellant; and

(c) The agreement entered into by the taikong and the Appellant, dated the 31st January, 1955, as to the lease of the junk by the Appellant to the taikong.

The effect of that evidence, if believed, showed that the junk had been leased by the appellant to the taikong on the basis that she was to receive a share in the net profits of all trading ventures in which the junk was employed. At the time of the sinking of the junk that net profit was in the ratio of 40% to the appellant and 60% to the taikong. But prior to that for some years past the vessel had been leased on the basis of a 30% net profit to the appellant and 70% to the taikong. The evidence further sought to show that the taikong had then engaged or recruited the crew as partners in a joint share of the profits.

If that evidence was accepted then, as I have already said, as a matter of law the crew were not "workmen" within the meaning of the Ordinance and the widows of the deceased were not entitled to compensation under the Ordinance.

As against that evidence there were statements made by three members of the crew that they were, in fact, engaged on a salary basis. There were also words used in the original statement of the taikong made to the Labour Commissioner, and the accounts furnished by the appellant and the taikong, from which an inference might well be drawn — and was, in fact, drawn — by the learned Arbitrator that the crew were "workmen" engaged and paid on a salary basis and not co-adventurers taking part in a joint venture on the basis of an agreed share of the profits.

To my mind, as I have already said, the difficulty in this case was not so much as to the point of law involved — since I think the point was clear to the learned Arbitrator — but in the issues of fact raised. The learned Arbitrator disbelieved the appellant and the taikong and found that the crew were workmen employed on a monthly salary. Those are findings

of fact which cannot be made the subject of an appeal to this Court. However, part of that finding of fact was undoubtedly based on the conclusion reached by the learned Arbitrator that one of the Profit and Loss Accounts produced by the appellant expressly discounted or disapproved her statement that she had entered into the lease of the junk with the taikong on the basis of a share in the net profits on a 30 : 70% ratio. Mr. Hume has pointed out, however, — and it is, indeed, the case — that a more accurate calculation of that account (Enclosure C-1) does, in fact, show that the net profit received by the appellant, to wit, $287.54 (there is a miscalculation here of $1 in the amount itself) after payment for various expenses incurred which totalled $157.60, is, in fact, 30% of the gross profits of that particular venture, which amounted to $1,484. The account, therefore, so far from disproving the appellant's contention, tended to prove the truth of her story that at that time the agreement between her and the taikong was that she should receive 30% of the net profits of the trading venture.

Despite that fact, however, I am of the opinion that I would not be in any way justified in interfering with the learned Arbitrator's finding of fact, wrong though it may be — and I do not for a moment say that it is wrong — were it not for one other vital consideration. The learned Arbitrator expressly refers in his grounds of decision — and clearly places reliance on the fact — that :—

"Statements were made by 3 of the surviving members of the crew and they all said they were paid wages on monthly basis and not on a profit sharing basis."

Those statements are on the Arbitrator's file. They are statements made to a Labour Officer, Mr. Chin Min Sian. They are unsworn statements and the persons who made them were apparently not present at the inquiry held by the Commissioner under section 27 of the Ordinance, and certainly not called as witnesses at the hearing before the Arbitrator. Clearly they are statements which go to the whole root of the issue, namely, whether the crew were joint venturers working on a profit sharing basis or workmen paid on a monthly salary.

Section 35 of the Workmen's Compensation Ordinance enacts that a Commissioner and an Arbitrator shall have all the powers of summoning witnesses and examining such witnesses on oath or affirmation. Section 35(4) enacts a penalty for persons making false statements before a Commissioner or an Arbitrator.

Presumably the statements recorded by the Officer of the Labour Department were taken by him, upon instructions given to him, as a preliminary investigation to an inquiry to be held by the Commissioner. Section 27 enables such a preliminary investigation to be made by a public officer specifically appointed in writing by the Commissioner for that purpose, and the section applies the provisions of section 35 to that officer so appointed for the purpose of holding such a preliminary investigation. The fact remains, however, that those statements were not taken upon oath and that there is nothing to indicate that any opportunity was given to the opposite party at any time to cross-examine the persons making those statements.

The onus of proof of establishing that her husband was a workman and therefore entitled to compensation under the Ordinance was upon the respondent.

The fact that the Arbitrator acts upon and treats as evidence unsworn statements made in the absence of the parties and without an opportunity to cross-examine on such statements is a mistake in law. As I have already said, clearly the statements made by these three members of the crew that they were paid wages on a monthly basis and not on a profit sharing basis was a contention which went to the root of the issue.

I am, therefore, of the opinion that the right and proper course for me to take in this matter is to direct a fresh inquiry to be heard before another Arbitrator. I appreciate the fact that it may well be difficult for the respondent to get in touch with the former members of the crew for the purpose of obtaining their evidence at the fresh inquiry, but I hope that this is a difficulty which may be solved.

The appeal is accordingly allowed with costs and I direct that a new inquiry be taken before another Arbitrator.

Appeal allowed.

Solicitors : *Hogan, Adam & Allan; M. Abraham.*

SYED BIN KADER & ORS. v. REG.

[C. C. A. (Whyatt C.J., Chua and Wee Chong Jin JJ.) February 11, 1958]

[Singapore — Criminal Appeal No. 22 of 1957]

Court of Criminal Appeal — Function of, in examining trial Judge's Summing-up — Misstatement and inaccuracy in Summing-up.

Possession — Doctrine of recent possession — Evidence consistent with both theft and receiving.

It is not the function of the Court of Criminal Appeal to examine in microscopic detail the summing-up of a trial Judge to see whether there has been any inaccuracy in summarising all the evidence given at the trial.